Supreme Court, U. S.
FILED
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MICHAEL RODAK, JR., CLERK

80-1165

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1980

PATRICK W. HANIGAN and THOMAS H. HANIGAN, Petitioners, vs. UNITED STATES OF AMERICA, Respondent.	NO. _____ (Ninth Circuit No. 80-1650)

PETITION FOR CERTIORARI
TO REVIEW DECISION OF THE
UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

POLLEY & POLLEY
GAYNES & ROCKAFELLOW, P.C.
By: Alex A. Gaynes
2438 East Broadway
Tucson, Arizona 85719

Date of Mailing: _____

QUESTIONS

Whether through interminable prosecutions (State Court acquittal followed by a Federal hung jury) citizens may be forced to additional trials:

(1) Without a review of the evidence at trial,

(2) Under circumstances "affording the Government another opportunity to supply evidence it failed to muster in the" first two proceedings,

(3) When evidence at the Federal trial was insufficient as a matter of law, and

(4) The reviewing courts in violation of Abney v. United States, 431 U.S. 651 (1977) did not even wait for trial transcripts before acting summarily.

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(1978) 10,23

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

Thomas and Patrick Hanigan, Petitioners herein, pray that a Writ of Certiorari issue to review the Order of District Court Judge Richard Bilby dated September 2, 1980, and the Order of the Ninth Circuit dated October 17, 1980.

This Petition has, as its primary basis an allegation of violation of Petitioners' rights to be free from double jeopardy, and is pursued pursuant to Abney v. United States, 431 U.S. 651 (1977).

DECISIONS OF THE COURTS BELOW

The Decision of the United States District Court for the District of Arizona (Bilby, D.J.) is reproduced in Appendix A. The Opinion and Judgment of the United States Court of Appeals for the Ninth Circuit sought to be reviewed is reproduced in Appendix B.

STATEMENT OF THE CASE

I. Jurisdiction of the Supreme Court.

The judgment of the United States Court of Appeals for the Ninth Circuit was entered on October 17, 1980. At that time, the mandate was immediately issued. Petitioners' filed a Petition to the Ninth Circuit for Rehearing with a mailing date of October 17, 1980 and a delivery date to the Ninth Circuit of October 20, 1980. Petitioners' Petition for Rehearing with the Suggestion for Rehearing En Banc was denied on December 3, 1980. Jurisdiction in this Court is conferred by 28 U.S.C.§§1291 and 1294, Abney v. United States, 431 U.S. 651 (1977), Cohen v. Beneficial Industrial Loan Corp., 337 U.S. 541, 69 S.Ct. 1221 (1949), and United States v. Lanza, 260 U.S. 377 (1922).

II. Introduction.

The United States Court of Appeals for the Ninth Circuit summarily dismissed the

double jeopardy appeal of Petitioners before Petitioners were able to fully brief the matter, before the transcript of the proceedings below were even typed, and at a time when counsel for Petitioners had no opportunity to fully advise the Court concerning all the circumstances of this case.

The Hanigans' attorneys appealed based on a claim of double jeopardy due to a proceeding in the District Court which ended when the jury could not agree on a verdict, and after the Court erroneously failed to dismiss the case wherein there was no evidence as a matter of law to allow the case to reach the jury.

The Hanigans were charged with a violation of 18 U.S.C. §1951, an act known as the Hobbs Act. The Hanigans had once been tried in State Court and acquitted of twenty-six (26) counts ranging from kidnapping and aggravated assault to robbery. After a two year delay, they were charged once again by the Federal Government, this time under the guise of the Hobbs Act.

Thus far, the trial judge has ruled that by virtue of an alleged robbery of $40.00, a key ring, and a dollar bill from three Mexican aliens traveling from Mexico towards Elfrieda, Arizona in search of work at an agricultural business in the State of Arizona, that the Hanigans knowingly and wilfully obstructed, delayed, affected, and attempted to obstruct, delay and affect commerce.

The record at the trial was devoid of any affect on interstate commerce.

The three illegal aliens alleged that they were on their way to seek work from a farmer named Wally Householder. Mr. Householder testified that had they arrived at his farm on August 18, 1976 he would have hired them. However, on cross-examination he was asked one question which was as follows:

"Question. Mr. Householder, would

it be fair to say that these three people not showing up on your farm on August 18, 1976, had absolutely no affect on any part of your business or operation in any conceivable manner; is that a true statement? Answer. I don't think it had any. Question. Is my statement true? Answer. Yes."

Trial Partial Transcript, June 27, 1980, page 12, lines 3 through 10.

Thus, the person to whom these individuals were allegedly going to work was not affected in any manner by non-appearance. Thus, the Government was unable to prove any arguable affect on interstate commerce.

On redirect examination, the prosecution attempted to show a "potential" impact on commerce. The questions and answers at trial were as follows:

"Question. By Mr. Hawkins: Would the failure of a worker like Bernabe

to show up have a potential for an affect on your farm's operations? Mr. Gaynes: I'm going to object, Judge, it's speculation. He just said that the people not showing up didn't have an affect. The Court: Well, he can answer that. Overruled. The Witness: I don't know, I don't know how to answer that. They didn't show up -- Question. (By Mr. Hawkins) But could it have had a potential affect on your farm's operations? Mr. Gaynes: I'm going to object. Now he's even further into speculation. He has already answered that he doesn't know, now were getting further from speculation. A. The Witness: I don't think it could have."

Partial transcript of June 27, 1980, page 13, lines 9 through 24.

The Hobbs Act requires an affect on interstate commerce before an individual may properly be charged thereunder.

The trial court was in error in allowing the case to go to the jury, and in not dismissing the case based on the Petitioners' numberous motions including their Post-Trial Rule 29(a) Motion for Judgment of Acquittal.

The Ninth Circuit and Judge Bilby in forcing the Hanigans to trial again has violated their rights to be free from double jeopardy. The Hanigans' rights to a proper determination by the District Judge has been violated. The Government is now being given a third opportunity to muster evidence against the Hanigans.

In doing so, the Ninth Circuit and the District Judge have sanctioned injustice, and a new and drastically expansive interpretation of the "Hobbs Act".

Never before has there been a criminal

prosecution under the Hobbs Act wherein the alleged victims were aliens, where the alleged victims were traveling on private property, where the alleged victims had no right to travel, where the alleged victims were trespassing, where the amounts involved were so insignificant, and where the affects on interstate commerce at trial were proven to be non-existent. Never has there been a Hobbs Act case in which the Government has attempted to clothe a "civil rights" prosecution under the guise of a Hobbs Act case. Nor has there ever been a dual prosecution sanctioned where the dual prosecution has come as a result of political pressure, and in an attempt to punish the Hanigans for being successful in a three-week Arizona jury trial in which the consequences to the Hanigans if found guilty would have been death.

Yet, in this criminal case, with no basis in prior law, the District Judge, and the Ninth Circuit have allowed a second Federal trial in a case where the evidence was insufficient.

Yet, in addition, in this case, with no basis in prior law, the District Court, and the Ninth Circuit have enlarged the scope of the Hobbs Act retroactively finding a cause of action. It is submitted that the Ninth Circuit's erroneous expansion of the statute conflicts with all prior judicial constructions, and operates as ex-post facto application of the statutes in violation of due process.

Requiring the Hanigans to stand trial when there was no evidence of affect on inter-state commerce violates the double jeopardy principles asserted and set forth by this Court in Burks v. U.S., 437 U.S. 1, 57 L.Ed.2d 1, 98 S.Ct. 2141 (1977); Greene v. Massey, 437 U.S. 19, 57 L.Ed.2d 15, 98 S.Ct. 2151 (1978); Crist v. Bretts, 437 U.S. 28, 57 L.Ed.2d 24, 98 S.Ct. 2156 (1978); Sanabria v. U.S., 437 U.S. 54, 57 L.Ed.2d 43, 98 S.Ct. 2170 (1978); and United States v. John Arthur Scott, 437 U.S. 82, 57 L. Ed.2d 65, 98 S.Ct. 2187 reh. den. 58 L.Ed.2d 197, 99 S.Ct. 226 (1978).

As a matter of law, the Hanigans proved their innocence of the charge of violating the Hobbs Act. The Court erroneously refused to recognize this fact. The Appellants are now entitled to have a full appellate review on the issue, based upon the evidence.

The Ninth Circuit has refused to undertake this review, and it is requested that this Court either review this case, or order that the Ninth Circuit review the evidence, and decide whether or not the Hanigans' double jeopardy rights are violated.

III. Statement of Essential Facts.

Patrick and Thomas Hanigan are residents of Arizona, living in Douglas, Arizona, an area adjacent to the Mexican/American border. The area is a hotbed of illegal alien traffic, a repository for problems centering around illegal alien traffic, and is now, by virtue of this case, a breeding ground for racial tension, fear and hatred. The problems engendered include robbery, pillage, and

fear. For almost nine years, a climate of fear has existed in Cochise County, Arizona based on the unalterable flow of illegal aliens and illegal alien robbers. Homes have become but armed fortresses. Protection and fear a way of life.

On August 18, 1976, three illegal aliens were allegedly robbed by George, Patrick and Thomas Hanigan. George W. Hanigan, the father of Petitioners, is now dead. On August 19, 1976, the Cochise County Attorney investigated the allegations. Shortly thereafter, Cochise County Attorney Richard Riley was contacted by high governmental officials in the Mexican government.

Riley's next move was to contact William Smitherman, the United States Attorney for the District of Arizona. Smitherman conducted an investigation and informed Mr. Riley that there are "no violations of Federal law". This information was forwarded to the Court by virtue of an Affidavit by Mr. Riley.

The State charges were formally lodged on December 8, 1976, and included fourteen (14) counts as to each of the Petitioners. The counts included allegations of kidnapping in violation of Arizona Revised Statutes, §13-491, Conspiracy to Kidnap (A.R.S. §13-331), Assault With A Deadly Weapon (A.R.S. §13-249), and Conspiracies to Assault With Deadly Weapons (A.R.S. §13-331). Some of the counts included life imprisonment.

The State of Arizona appointed a "special prosecutor" and the resource of the State of Arizona were directed against the Hanigans. In defending the Hanigans, the Hanigans' lawyers, Alan and Wesley Polley, billed the Hanigans approximately $60,000.00 for their services. The case was protracted, hard-fought, and lasted approximately three weeks. Never has the Government contended otherwise.

The emotional problems of the charges were compounded by incidents of threats and

harassment of the Hanigans. As if the Hanigans were not under enough pressure, rumors were circulated that the Hanigans' pictures were being circulated in the Arizona State Prison so that if convicted they would not last through their prison terms.

Racial relations are particularly explosive, and the venom of the Mexican/American populous has been vented against and upon the Hanigans. The tension at the latest trial, the Federal trial, are almost indescribable. The Federal trial played before a packed house for each of its twenty-four days. In fact, while the jury was deliberating through six days, various groups stood vigil at the courthouse awaiting the verdict. During each day of trial there were demonstrations, marches, and sign holdings.

The issues at both trials concerned credibility of three complaining witnesses. In both trials the complaining witnesses were

confronted with numerous inconsistent statements and misstatements. Because of the lies of the complaining witnesses, the first trial jurors did not believe them. Affidavits to this affect were presented to the Court. These Affidavits are uncontradicted.

During the course of the State court trial it was found that the Mexican government had a financial interest in the litigation, and that in the event the aliens were successful, the Mexican government would be sharing in the bounty.

The State court trial revealed that the case was orchestrated by Mexican governmental officials, the witnesses were coached by a Mexican official, and even admitted violating the Court's admonitions concerning the discussion of the case with witnesses. The witnesses further revealed that since the time of the occurrences they were under twenty-four hour custody and house arrest by Mexican

officials. By the time the Federal trial arrived, some four years after the alleged incident, the alleged victims were still under Mexican government employ, living in Mexican government housing, doing the bidding of their Mexican governmental masters.

Discovery in the case was managed only through the good offices of the Mexican consul. Needless to say, possible exculpatory material was lost to the Hanigans. Those witnesses desired by the Government and located in Mexico were brought to trial. Those witnesses desired by the defendants who resided in Mexico were foreclosed to the Hanigans.

Despite these impediments to a fair trial, and despite the ability of the government to attempt to review the previous trial transcript and fill in any weaknesses and gaps, the Government could once again not convict.

The charges in the Federal case arose

after political lobbying. The political lobbying by Hispanic groups was unsuccessful on William Smitherman, the former United States Attorney for the District of Arizona, and Griffin Bell, former Attorney General of the United States, who declined prosecution and made pronouncements to that effect, as did A. Bates Butler, III, the ranking prosecutor in the Tucson office now attached to the prosecution. At the time of the dismissal of a lawsuit filed by the Hispanic groups to require a prosecution, Attorney Griffin Bell said the Hanigan case was over. It was only after Hispanic groups lobbied the Senate Judiciary Committee upon Benjamin Civiletti's ascension to the duties of Attorney General that an indictment was levied.

A tortured construction of the Hobbs Act was utilized so that the Civil Rights Division of the Justice Department could become involved in the case. Attorney Linda K. Davis then attached to the Civil Rights

Division of the Justice Department made this statement to the Court:

> "Your Honor, I would initially submit that while this is not a case brought within the technical framework of the Civil Rights statute designed as such within the Federal Criminal Code, that this is a Civil Rights case if there ever was one."

Judge Bilby, despite ruling against the Hanigans continually in their motions to dismiss, noted:

> "I think you would probably agree with me that this is about as far as you can stretch the Hobbs Act."

Judge Bilby is also noted that as to the Hobbs Act:

> ... "If the Federal Government chooses to employ it, the Hobbs Act federalizes the vast majority of extortion and robberies in the country ... "

The basis of Federal and State relationships have been unalterably disturbed by the Court's rulings to date.

At the Federal trial there was no satisfactory evidence of any affect on commerce. To allow the Hanigans to go to trial again will give the Government a third opportunity to marshal their evidence.

"The double jeopardy clause forbids a second trial for the purpose of affording the prosecution another opportunity to supply evidence which it failed to muster in the first proceeding. This is central to the objective of the prohibition against successive trials." Burks v. U.S., 437 U.S. at 11; 57 L. Ed.2d at 9.

It is this violation of the central purpose of the double jeopardy clause which has been violated in this case, and which the Hanigans are requesting the Court to review.

Once the Hanigans are retried, whether they win or lose, they lose. Whether they win or lose, the double jeopardy clause has been violated. The purpose of Abney appeals is to protect a petitioner from being forced to trial on successive occasions in violation of our Constitutional provisions.

REASONS FOR GRANTING THE WRIT

Point One

The Court of Appeals had jurisdiction, and in fact, was constitutionally mandated to hear an Interlocutory Appeal grounded on the issue of double jeopardy. Abney v. United States, 431 U.S. 658, 97 S.Ct. 2034, 52 L.Ed.2d 651 (1977). The rationale is simple, if an individual is allowed to go to trial in violation of his double jeopardy rights, then the protection of the Constitution has already been jeopardized. He has already been twice placed in jeopardy. Abney recognized that the protection is intended to be a prospective protection. That is, the guaranty is against being tried in violation of the Constitutional provision. For this reason, this Court should return this case to the Court of Appeals requiring the Court of Appeals to review this case and the issue of double jeopardy as raised.

Permitting a sovereign to freely subject citizens to a second or a third trial for the

same offense would arm the Government with a potent instrument of oppression. U.S. v. Martin Linen Supply Company, 97 S.Ct. 1349, 51 L.Ed.2d 642 (1977). It is this weapon which is being utilized in the Hanigan case. The Hanigans are now facing their third trial.

In the area of double jeopardy, the Supreme Court of the United States has disparaged "rigid mechanical" rules. Illinois v. Somerville, 410 U.S. 458, 35 L.Ed.2d 425 (1973). However, it is just these rigid mechanical rules which are being utilized by the Court of Appeals in failing to review the issues.

Similarly, this Court has held that the clause means something far broader than its literal language. Breed v. Jones, 421 U.S. 519, 95 S.Ct. 1779, 44 L.Ed.2d 346 (1975).

On June 14, 1978, this Court decided the cases of Burks v. U.S., 437 U.S. 1, 57 L.Ed. 2d 1, 98 S.Ct. 2141 (1977); Greene v. Massey, 437 U.S. 19, 57 L.Ed.2d 15, 98 S.Ct. 2151 (1978); Crist v. Bretz, 437 U.S. 28, 57 L.Ed.2d 24,

98 S.Ct. 2156 (1978); Sanabria v. U.S., 437 U.S. 54, 57 L.Ed.2d 43, 98 S.Ct. 2170 (1978); and U.S. v. John Arthur Scott, 437 U.S. 82, 57 L.Ed.2d 65, 98 S.Ct. 2187 reh. den. 58 L.Ed. 2d 197, 99 S.Ct. 226 (1978). The series of cases cited above irrevocably changed the course of double jeopardy interpretation, and overruled a long line of double jeopardy cases. These cases evolved from a line of cases begun with Greene v. U.S., 355 U.S. 184, 75 S.Ct. 221, 2 L.Ed.2d 199 (1957), continuing with Benton v. Maryland, 395 U.S. 784, 89 S.Ct. 2056, and culminating in Ashe v. Swenson, 397 U.S. 436, 90 S.Ct. 1189 (1970). Green asserted the importance of the doctrine, Benton v. Maryland recognized that the guaranty against double jeopardy was "fundamental in nature", and Ashe v. Swenson incorporated within the double jeopardy protections, the protections of collateral estoppel.

However, until June 14, 1978, the double jeopardy clause did not preclude a second trial

in the instance wherein a reviewing court found that the evidence of trial was insufficient as a matter of law.

Thus, until Burks and its companion cases were decided, it did not matter whether evidentiary facts caused reversal or procedural items caused reversal, or even whether the evidence was insufficient. Before Burks a reversal of a conviction meant a new trial. Thus, if there was a mistrial, the mere fact of the retrial would not have violated any prevalent constitutional interpretation.

June 14, 1978 changed this situation. As of June 14, 1978, the double jeopardy clause precludes a second trial once a reviewing Court determines that evidence at the trial is insufficient to sustain a verdict. Greene v. Massey, 437 U.S. 19, 25, 57 L.Ed.2d 15, 21 (June 14, 1978). Thus, how can a litigant be protected from double jeopardy if the reviewing court will not review the sufficiency or insufficiency of the evidence? This is the catch 22 situation

involving the Hanigans.

The sufficiency of the evidence at a trial is a matter of double jeopardy concern. It then becomes important to note whether evidence is sufficient or insufficient. If the evidence is insufficient, then clearly the litigant cannot be tried again. If the evidence was sufficient, then a retrial would not be in violation of that litigant's double jeopardy rights. It is requested that this Court order the review of the sufficiency of the evidence at the second trial (first Federal trial) in light of the evidentiary insufficiency. In reviewing this case, the Court should require an understanding and recognition of the principles set forth in Greene v. U.S., 355 U.S. 184, 75 S.Ct. 221, 61 A.L.R.2d 1119, 2 L.Ed.2d 199, that this constitutional right is a vital safeguard of our society, and should not be given a "narrow, grudging application".

It had previously been argued in many

cases, that an insufficiency determination by a reviewing court was somehow different than an insufficiency determination either by the jury, or by the court sitting without a jury. Burks and its progeny changed this.

It is the contention of the Hanigans that since the trial court erred because the evidence was, as a matter of law, insufficient to confer jurisdiction on the Federal Court under the Hobbs Act, the Court should have granted defendants' numerous Motions for Judgment of Acquittal. To say that this decision is not appealable in the context of double jeopardy would create a purely arbitrary distinction between those in the positions of the Hanigans where the Judge acted incorrectly at trial, or correctly. As the Court in Burks notes of this artificial distinction:

> "By deciding that the Government had failed to come forward with sufficient proof of Petitioner's capacity to be responsible for criminal acts,

that Court was clearly saying that Burks' criminal culpability had not been established. If the District Court had so held in the first instance, as a reviewing court said it should have done, a judgment of acquittal would have been entered and, of course, Petitioner could not be retried for the same offense."

437 U.S. at 10 through 11; 57 L.Ed.2d at 9.

This is exactly the situation in the Hanigan case. The Burks court recognized:

"Consequently, as Mr. Douglas correctly perceived in Sapir, it should make no difference that the reviewing court, rather than the trial court, determine the evidence to be insufficient. See 348 U.S. at 374, 99 L.Ed. 426, 75 S.Ct. 422. The Appellate decision unmistakably

meant that the District Court had erred in failing to grant a judgment of acquittal. To hold otherwise would create a purely arbitrary distinction between those in Petitioner's position and others who would enjoy the benefit of a correct decision by the District Court." [Emphasis supplied.]

Under any reasonable reviewing standard the evidence at the first Federal trial was totally insufficient under a statute which had been unbelievably strained to be brought in the first place.

As noted previously:

"The double jeopardy clause forbids a second trial for the purpose of affording the prosecution another opportunity to supply evidence which it failed to muster in the first proceeding.

This is central to the objective of the prohibition against successive trials." Burks v. U.S., 437 U.S. at 11; 57 L.Ed.2d at 9.

The Burks court sustained the Petitioner's contention that:

> "It makes no difference that the determination of evidentiary sufficiency was made by a reviewing court since the double jeopardy considerations are the same, regardless of which court decides that a judgment of acquittal is in order." 437 U.S. at 6; 57 L.Ed.2d at 6.

To treat these important double jeopardy concerns otherwise would be to exalt mere technical formulations over substance, fairness, and constitutional protections. ..."It is difficult to conceive how society has any greater interest in retrying a defendant when,

on review, it is decided as a matter of law that the jury could not have properly returned a verdict of guilty." 437 U.S. at 16; 57 L.Ed. 2d at 13.

The purposes of the double jeopardy clause would be "negated were we to afford the Government an opportunity for the proverbial 'second bite of the apple'." 437 U.S. at 17; 57 L.Ed.2d at 13.

To allow second Federal prosecution without this Court reviewing or requiring the Ninth Circuit to review the first totally deficient Federal prosecution would allow the Government the opportunity to supply evidence which was completely deficient at trial.

This case involves alleged robbery of illegal aliens allegedly on their way to work while unlawfully trespassing on private property. The robbery allegedly affected interstate commerce. At trial, there was absolutely no credible evidence of any nature or kind which would trigger the Hobbs Act thereby conveying

jurisdiction on the Court.

If this Court does not review this case, or require the Ninth Circuit to review the case, the Government will, in its next trial, attempt to supply the missing elements. The Federal Government has already had two dry runs at the Hanigans. Isn't that enough?

For these reasons it is requested that the Court review the order of the Ninth Circuit and either accept full review in this Court deciding the issue of the applicability of the Hobbs Act, or order that the Ninth Circuit review the evidentiary insufficiency under the Hobbs Act, thereby protecting the Hanigans from triple jeopardy.

RESPECTFULLY SUBMITTED this 22nd day of October, 1980.

POLLEY & POLLEY
GAYNES & ROCKAFELLOW, P.C.

By _____
ALEX A. GAYNES
2438 E. Broadway
Tucson, Arizona 85719
Telephone: (602) 792-4983
Attorneys for Petitioners

AFFIDAVIT OF SERVICE

STATE OF ARIZONA)
) ss.
COUNTY OF PIMA)

ALEX A. GAYNES, being first duly sworn upon his oath, deposes and says:

That he is the attorney for the Petitioners Hanigan herein;

That, as such, he has caused to be mailed and/or delivered, two (2) copies of Petitioners' Petition for Certiorari to Review Decision of the United States Court of Appeals for the Ninth Circuit to each of the following persons on the 6th day of ~~October~~ January, 1981:

A. Bates Butler, III
Chief Asst. U.S. Attorney
District of Arizona
120 West Broadway
P.O. Box 1951
Tucson, Arizona 85702

Solicitor General of the
United States
Department of Justice
Washington, D.C. 20530

FURTHER AFFIANT SAYETH NOT.

ALEX A. GAYNES

SUBSCRIBED AND SWORN to before me this 6th day of ~~October~~ January, 1981, by ALEX A. GAYNES.

Sandra G. Donovan
Notary Public

My Commission Expires:

09-18-83

APPENDIX A

IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF ARIZONA

DATE September 2, 1980

UNITED STATES OF AMERICA, PLAINTIFF, vs. PATRICK W. HANITAN and THOMAS HANIGAN, DEFENDANT.	No. CR 79-206-TUC-RMB ORDER

IT IS ORDERED that defendants' Motion for Judgment of Acquittal is DENIED.

IT IS FURTHER ORDERED that this matter is set for trial on Tuesday, October 7, 1980, at 9:00 A.M.

s/ Richard M. Bilby

RICHARD M. BILBY
United States District Judge

APPENDIX B

JUDGMENT FILED Oct 23 10:56 A.M. '80

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA, Plaintiff, Appellee, vs. PATRICK W. HANIGAN and THOMAS HANIGAN, Defendants/Appellants.	)	NO. 80-1650 DC CR 79-2061-1) 79-2061-2) RMB

APPEAL from the United States District Court for the District of Arizona (Tucson) and was duly submitted.

ON CONSIDERATION WHEREOF, It is now here ordered and adjudged by this Court, that the appeal in this Cause be, and hereby is dismissed.

Filed and entered October 17, 1980.

A TRUE COPY
ATTEST
20 OCT 1980
Richard H. Deane
Clerk of Court
by: s/Oscar Tagle
Deputy Clerk

FILED Oct. 17 '80
Richard H. Deane
Clerk, U.S. COURT OF APPEALS

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA, Plaintiff-Appellee, vs. PATRICK W. HANIGAN and THOMAS HANIGAN, Defendants-Appellants.	No. 80-1650 DC# CR 79-206-1-2 RM Arizona (Tucson) ORDER

Before: PREGERSON and NELSON, Circuit Judges

Appellee's emergency motion to dismiss, filed September 30, 1980, is granted. The order appealed from is not subject to interlocutory appeal. United States v. Carnes, 618 F.2d 68 (9th Cir. 1980). This appeal is dismissed.

The mandate shall issue forthwith.

CR CAL 10/13/80

APPENDIX C

FILED
December 3, 1980
Richard H. Deane
Clerk, U.S. COURT
OF APPEALS

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA, Plaintiff-Appellee, v. PATRICK W. HANIGAN and THOMAS HANIGAN, Defendants-Appellants.	NO. 80-1650 ORDER

Before: PREGERSON and NELSON, Circuit Judges

The panel as constituted in the above case has voted to deny the petition for rehearing and to reject the suggestion for a rehearing en banc.

The full court has been advised of the suggestion for an en banc hearing, and no active judge of the court has requested a vote on the suggestion for rehearing en banc. Fed. R.

App. P. 35(b).

The petition for rehearing is denied and the suggestion for a rehearing en banc is rejected.

CR Cal 10/13/80

APPENDIX D

FILED Oct. 10 2:13 PM '79

MICHAEL D. HAWKINS
United States Attorney
District of Arizona
Post Office Box 1951
Tucson, Arizona 85702
Telephone: 602-792-6511
Attorneys for Plaintiff

IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF ARIZONA

UNITED STATES OF AMERICA, Plaintiff, vs. PATRICK W. HANIGAN and THOMAS H. HANIGAN, Defendants.	CR-79-206-TUC INDICTMENT Violations: 18 U.S.C. §1951 18 U.S.C. §2 (Robbery affecting commerce; Aiding and abetting)

THE GRAND JURY CHARGES:

COUNT ONE

(1) That at all times material herein, Manuel Garcia Loya, Eleazar Ruelas Zavala and Bernabe Herrera Mata, residents and citizens of Mexico, were travelling from Mexico toward Elfrieda, Arizona, in search of work at agricultural business in the State of Arizona.

(2) That at all times material herein the agricultural businesses at which Manuel Garcia Loya, Eleazar Ruelas Zavala and

Bernabe Herrera Mata were seeking employment received and sold goods shipped in interstate commerce and used labor moving in interstate and foreign commerce.

(3) That, on or about August 18, 1976, in Cochise County, in the District of Arizona, the defendants, PATRICK W. HANIGAN and THOMAS H. HANIGAN, did unlawfully, knowingly and willfully obstruct, delay and affect, and attempt to obstruct, delay and affect commerce, and the movement of articles and commodities in commerce, by the robbery of Manuel Garcia Loya, as the terms "commerce" and "robbery" are defined in Section 1951 of Title 18, United States Code, and committed physical violence to the persons and property of Manuel Garcia Loya, Eleazar Ruelas Zavala and Bernabe Herrera Mata in furtherance of a purpose to commit robbery of Manuel Garcia Loya, that is to say, the defendants did unlawfully take and obtain personal property in the form of United States currency in the approximate

amount of thirty-six dollars and clothing from the person and in the presence of Manuel Garcia Loya, against his will, by means of the actual and threatened use of force, violence and fear of injury to the persons and property of Manuel Garcia Loya and of his companions Eleazar Ruelas Zavala and Bernabe Herrera Mata including, but not limited to, physical restraint with ropes, the use of knives to cut and remove their clothing and hair, threats to burn them with a heated metal rod, and the brandishing and shooting of firearms.

All in violation of 18 U.S.C. §§ 1951 and 2.

COUNT TWO

(1) That at all times material herein, Manuel Garcia Loya, Eleazar Ruelas Zavala and Bernabe Herrera Mata, residents and citizens of Mexico, were travelling from Mexico toward Elfrieda, Arizona, in search of work at agricultural businesses in the State

of Arizona.

(2) That at all times material herein the agricultural businesses at which Manuel Garcia Loya, Eleazar Ruelas Zavala and Bernabe Herrera Mata were seeking employment received and sold goods shipped in interstate commerce and used labor moving in interstate and foreign commerce.

(3) That, on or about August 18, 1976, in Cochise County, in the District of Arizona, the defendants, PATRICK W. HANIGAN and THOMAS H. HANIGAN, did unlawfully, knowingly and wilfully obstruct, delay and affect, and attempt to obstruct, delay and affect commerce, and the movement of articles and commodities in commerce, by the robbery of Eleazar Ruelas Zavala, as the terms "commerce" and "robbery" are defined in Section 1951 of Title 18, United States Code, and committed physical violence to the persons and property of Manuel Garcia Loya, Eleazar Ruelas Zavala and Bernabe Herrera Mata in furtherance of

a purpose to commit robbery of Eleazar Ruelas Zavala, that is to say, the defendants did unlawfully take and obtain personal property in the form of a key ring and clothing from the person and in the presence of Eleazar Ruelas Zavala, against his will, by means of the actual and threatened use of force, violence and fear of injury to the persons and property of Eleazar Ruelas Zavala and of his companions Bernabe Herrera Mata and Manuel Garcia Loya including, but not limited to, physical restraint with ropes, the use of knives to cut and remove their clothing and hair, threats to burn them with a heated metal rod, and the brandishing and shooting of firearms.

All in violation of 18 U.S.C. §§ 1951 and 2.

COUNT THREE

(1) That at all times material herein, Manuel Garcia Loya, Eleazar Ruelas Zavala and Bernabe Herrera Mata, residents and citizens of Mexico, were travelling from Mexico toward

Elfrida, Arizona, in search of work at agricultural businesses in the State of Arizona.

(2) That at all times material herein the agricultural businesses at which Manuel Garcia Loya, Eleazar Ruelas Zavala and Bernabe Herrera Mata were seeking employment received and sold goods shipped in interstate commerce and used labor moving in interstate and foreign commerce.

(3) That, on or about August 18, 1976, in Cochise County, in the District of Arizona, the defendants, PATRICK W. HANIGAN and THOMAS H. HANIGAN, did unlawfully, knowingly and willfully obstruct, delay and affect, and attempt to obstruct, delay and affect commerce, and the movement of articles and commodities in commerce, by the robbery of Bernabe Herrera Mata, as the terms "commerce" and "robbery" are defined in Section 1951 of Title 18, United States Code, and committed physical violence to the persons and property of Manuel Garcia Loya, Eleazar Ruelas Zavala

and Bernabe Herrera Mata in furtherance of a purpose to commit robbery of Bernabe Herrera Mata, that is to say, the defendants did unlawfully take and obtain personal property in the form of United States currency in the approximate amount of one dollar and clothing from the person and in the presence of Bernabe Herrera Mata, against his will, by means of the actual and threatened use of force, violence and fear of injury to the persons and property of Bernabe Herrera Mata and of his companions Manuel Garcia Loya and Eleazar Ruelas Zavala including, but not limited to, physical restraint with ropes, the use of knives to cut and remove their clothing and hair, threats to burn them with a heated metal rod, and the brandishing and shooting of firearms.

All in violation of 18 U.S.C. §§ 1951 and 2.

A TRUE BILL

/s/ Kourt D. Wofford
FOREMAN

/s/ Michael D. Hawkins
MICHAEL D. HAWKINS
United States Attorney
District of Arizona

No. 80-1165

In the Supreme Court of the United States

OCTOBER TERM, 1980

PATRICK W. HANIGAN AND THOMAS H. HANIGAN,
PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

WADE H. MCCREE, JR.
Solicitor General
Department of Justice
Washington, D.C. 20530
(202) 633-2217

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MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

Petitioners contend that the court of appeals erred by dismissing their appeal from a ruling of the district court denying their post-trial motion for judgment of acquittal and ordering a retrial of the case.

1. Petitioners were indicted in the United States District Court for the District of Arizona for violation of the Hobbs Act, 18 U.S.C. 1951. The indictment charged that petitioners had obstructed interstate commerce by robbing and assaulting three Mexican citizens who travelled from Mexico to Arizona in search of employment (Pet. App. D).[1]

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[1]Prior to their federal court indictment, petitioners were tried in state court and were acquitted on certain charges growing out of the same events. They unsuccessfully contended in the district court that the prior state court prosecution gave rise to a double jeopardy bar against further prosecution under federal law. The court of appeals affirmmed the

Following a trial by jury, the members of the jury panel were unable to reach a verdict and the district court ordered a mistrial. On the same day, petitioners made a motion for a judgment of acquittal. In support of their motion, petitioners filed a memorandum contending that the Hobbs Act did not apply to the conduct described in the indictment and that the prosecutor failed to prove that the events in question had any effect on commerce. The district court denied the motion without opinion and set the case for retrial (Pet. App. A). Petitioners then appealed the denial of their motion for a judgment of acquittal.[2]

The prosecutor moved to dismiss the appeal on the ground that it was not based on a final judgment. The court of appeals granted the dismissal motion on October 17, 1980 (Pet. App. B), relying on its recent decision in *United States* v. *Carnes*, 618 F. 2d 68 (9th Cir.), cert. denied, No. 79-6629 (June 16, 1980).

Following the decision of the court of appeals and a denial of rehearing on December 3, 1980, petitioners filed a petition for a writ of certiorari in this Court on January 13, 1981, one week before their retrial was scheduled to commence. On January 15, 1981, petitioners' application for a stay of the retrial in the district court was denied by Mr. Justice Rehnquist. The retrial began in the district court on January 20, 1981.

2. Petitioners contend (Pet. 21-31) that this Court's decision in *Abney* v. *United States*, 431 U.S. 651 (1977), entitles

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district court's rejection of that double jeopardy claim, and this Court denied certiorari. *Hanigan* v. *United States*, No. 79-1609 (May 19, 1980).

[2]In addition, before the start of the retrial, petitioners filed a motion to dismiss the indictment and based the motion in part upon their double jeopardy claim. The district court has not ruled upon the motion, but is deferring its decision until the close of evidence.

them to interlocutory appellate review of the district court's ruling denying their motion for a judgment of acquittal. In their view, *Abney* requires the court of appeals to consider at this interlocutory stage the question whether the government presented sufficient evidence during the first trial from which the jury could find guilt beyond a reasonable doubt. In the absence of such a determination, they contend, they may not be retried consistent with this Court's decision in *Burks* v. *United States*, 437 U.S. 1 (1978).

Whatever the merits of petitioners' claim under *Abney* and *Burks*,[3] this case plainly presents an inappropriate vehicle to resolve the issue they raise. The retrial in this case commenced on January 20, 1981. Based on the length of time required to try the case during the first trial, it is anticipated that the retrial will be completed within a week of the filing of this memorandum and prior to any action by this Court on the petition for a writ of certiorari.

If petitioners are acquitted at trial, their double jeopardy claims will be moot. On the other hand, if they are convicted, and if they believe either that the government's proof was inadequate in the second trial or was inadequate during the first trial and was improperly supplemented during the second trial, they may present such claims, together with any others arising out of the retrial, at one time on review of a final judgment of conviction. Since it is no longer feasible to pursue interlocutory review in this case, petitioners should present their double jeopardy claims (if they are

[3] *United States* v. *Becton*, 632 F. 2d 1294 (5th Cir. 1980), is in agreement with the Ninth Circuit's ruling here that interlocutory appellate review is not available to test the sufficiency of the government's evidence during a trial that leads to a mistrial and necessitates a new trial. In cases in which defendants successfully have appealed an initial conviction, and have claimed on remand that retrial is barred by the government's failure to adduce sufficient evidence during the original trial, two courts of appeals have granted immediate appellate review. See *United States* v. *United States Gypsum Co.*, 600 F. 2d 414 (3d Cir. 1979); *United States* v. *Jelsma*, 630 F. 2d 778 (10th Cir. 1980).

convicted) on review of the district court's final judgment. See *United States* v. *Becton, supra,* 632 F. 2d at 1296 ("it is not an open question * * * that precisely this issue [double jeopardy] is subject to review on appeal from a * * * conviction, should one occur").

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

WADE H. MCCREE, JR.
Solicitor General

FEBRUARY 1981